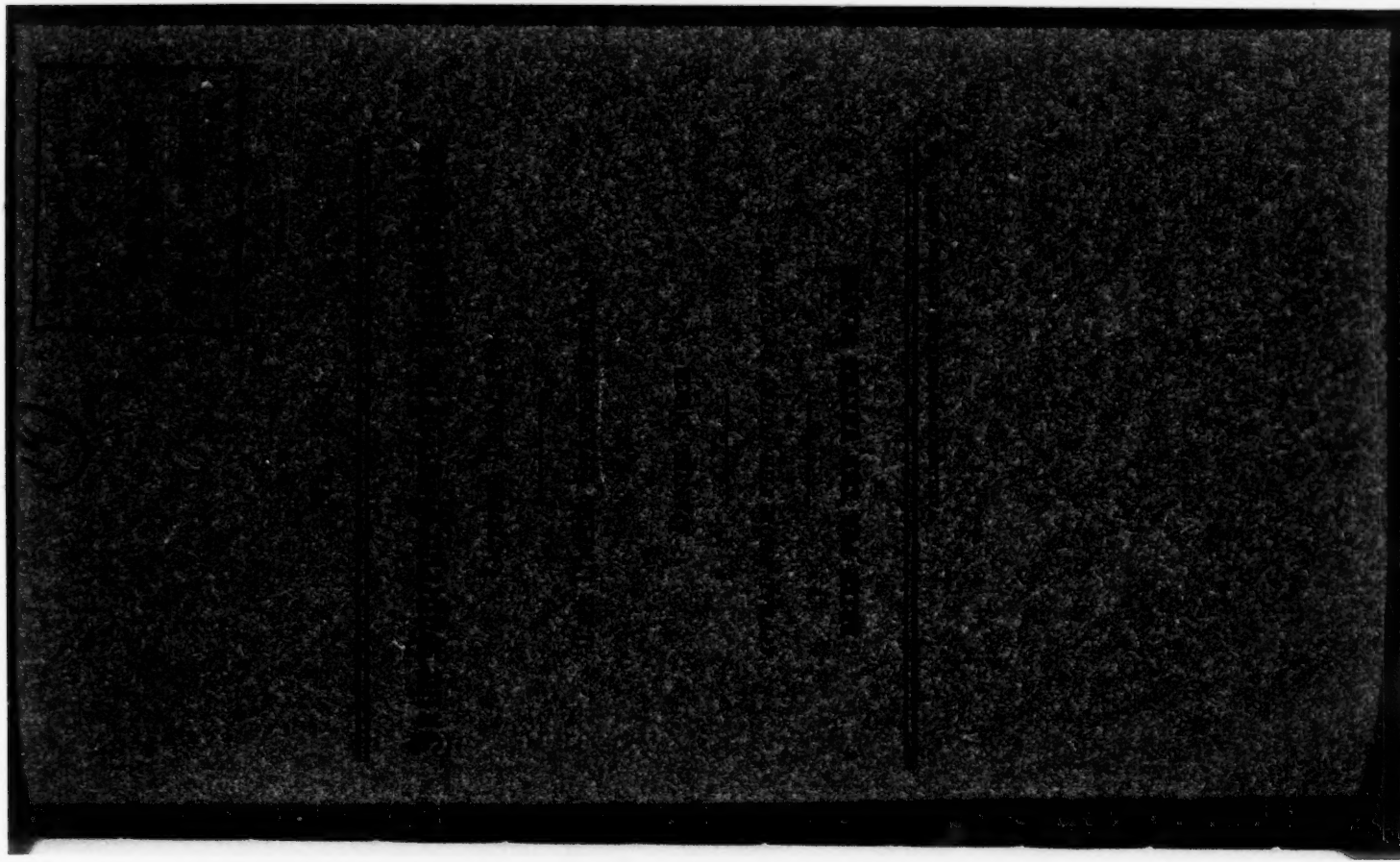

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In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES, APPELLANT
v.
DANIEL NOCE
No. 360

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

The appellee is an officer in the Army who was appointed a cadet at the West Point Military Academy August 1, 1913. He graduated from the Academy April 20, 1917. Counting his cadet service from August 1, 1913, to April 20, 1917, appellee would be entitled to the sum of $467.66 as longevity pay from the date of approval of the Act of May 18, 1920, hereinafter set out, to April 19, 1922, the period covered by this claim.

The Court of Claims found as a conclusion of law that appellee's cadet service *should be counted* and awarded him the amount claimed. The United States opposed the claim, and now opposes it, on the ground that the Act of August 24, 1912, 37 Stat.

569, 594, expressly provides that cadet service "*shall not be counted in computing for any purpose the length of service of any officer of the Army.*"

The appellee contended and it was the opinion of the Court of Claims (Judge Hay dissenting to the Court's action in overruling the motion for a new trial. Page 10 of the Record) that this Act of 1912, in so far as it affected the longevity rights of Army officers, was impliedly repealed by the proviso in the 11th section of the Act of May 18, 1920, 41 Stat. 601, 603.

Whether the Act of 1920 did impliedly repeal that of 1912 is the sole question in the case.

The pertinent provision of the Act of 1912 is as follows:

> That hereafter the service of a cadet who may hereafter be appointed to the United States Military Academy, or to the Naval Academy, shall not be counted in computing for any purpose the length of service of any officer of the Army.

A similar provision was incorporated in the Act of March 4, 1913, 37 Stat. 891. It read:

> Hereafter the service of a midshipman at the United States Naval Academy, or that of a cadet at the United States Military Academy, who may hereafter be appointed to the United States Naval Academy, or to the United States Military Academy, shall not be counted in computing for any purpose the length of service of any officer in the naval or in the Marine Corps.

The pertinent provision of the Act of 1920 is as follows:

> That in lieu of compensation now prescribed by law, commissioned officers of the Coast and Geodetic Survey shall receive the same pay and allowances as now are or hereafter may be prescribed for officers of the Navy with whom they hold relative rank as prescribed in the Act of May 22, 1917, entitled "An Act to temporarily increase the commissioned and warrant and enlisted strength of the Navy and Marine Corps, and for other purposes," including longevity: and all laws relating to the retirement of commissioned officers of the Navy shall hereafter apply to commissioned officers of the Coast and Geodetic Survey: *Provided*, That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services.

ARGUMENT

It will be conceded that appellee is not entitled to recover if the Act of 1912 has not been repealed so far as applicable to the longevity rights of Army officers. It will be conceded, also, that the Act of 1920 does not expressly repeal that of 1912. Appellee, then, can not recover unless it is held that the Act of 1912 is repealed by that of 1920 by implication.

The question will best be approached by a brief historical introduction to the Act of 1912.

Background of the Act of 1912

Successive acts providing for longevity pay to Army officers were those of July 15, 1838, 5 Stat. 256, c. 162, sec. 15; March 2, 1867, 14 Stat. 423, c. 145, sec. 9; July 15, 1870, R. S. sec. 1262 (the pertinent parts of all of which are quoted in *United States* v. *Watson,* 130 U. S. 80, 81). The longevity pay thus authorized was required by Acts of February 24, 1881, 21 Stat. 346, and June 30, 1882, 22 Stat. 118, to be calculated "upon the actual time of service in the Army." The United States contended this did not include service at the West Point Military Academy. (17 Op. A. G. 93.) This court held otherwise. (*United States* v. *Morton,* 112 U. S. 1; *United States* v. *Watson,* 130 U. S. 80.)

The *Morton case* was decided October 27, 1884, and the *Watson case,* reaffirming the principle of the *Morton case,* was decided March 11, 1889. Both were based on various Acts of Congress indicating, the Court said, the intent of Congress that service at West Point was to be treated as service in the Army. Thereafter, and until the Act of August 24, 1912, by virture of these decisions, Army officers who had been cadets at the Military Academy counted the time of their service there in calculating longevity pay. Therein they had a great advantage over those officers who had not had the benefit of free education at West Point. Congress regarded this as an unfair discrimination and therefore passed the Act of 1912.

The Act of 1912 originated as House bill 18956, Sixty-second Congress, second session. (The bill which was signed was No. 25531, identical with No. 18956 as to this section.) The report of the House Committee on Military Affairs (H. R. 270, p. 64, 62d Cong., 2d sess.) thus stated its purpose:

> Section 7 [afterwards altered to 6] of the bill also proposes that service as a cadet of the United States Military Academy, or as a naval cadet or midshipman, shall not be counted in computing for any purpose the length of service of any officer of the Army. In computing length of service of officers of the Army, in order to determine their right to the 10 per cent increase of pay that is allowed by law for each five-year period during 20 years of active service, it has been the practice of the War Department for a considerable number of years to count the time previously spent by such officers as pupils undergoing instruction, at the expense of the United States, as cadets of the Military Academy or as naval cadets or midshipmen, this instruction being for the purpose of enabling them to secure appointments as second lieutenants in the Army or as ensigns in the Navy. The result of this practice is that a graduate of the Military Academy who was appointed a second lieutenant, after having been educated for that appointment for four or more years wholly at the expense of the Government, receives his first 10 per cent increase of pay after not more than one year of service as a com-

missioned officer, whereas the second lieutenant who is appointed from civil life, after having been fitted for the appointment wholly at his own expense, must serve for five full years as a commissioned officer before he can receive his first 10 per cent increase of pay. And the same disparity between the two cases continues to the end, the graduate of the academy receiving each succeeding longevity increase of pay at least four years in advance of the officer appointed at the same time from civil life. Moreover, if, as is not infrequently the case, a cadet is retained at the academy for five years because of his inability to keep up with his class and complete the course in the prescribed four years, he receives his first longevity increase of pay immediately upon being graduated and commissioned as a second lieutenant. In other words, his own deficiency or inability as a student gives him an advantage of a year, in respect of service increase of pay, over those who were graduated and commissioned with him after completing the course in four years; and it gives him an advantage of five years over second lieutenants appointed from civil life. Former naval cadets or midshipmen, of whom a good many have been appointed second lieutenants in the Army, begin their military careers with an allowance of from four to six years' service for longevity pay purposes, and the advantage thus given them in this respect over graduates of the Military Academy and appointees from

civil life continues through all of the four periods for which increase of pay for length of service is allowed by law.

It is but just to say that this preposterous practice did not originate with the War Department. It was the result of a decision rendered by the Supreme Court October 27, 1884 (*Morton* v *United States*, 112 U. S., 1), to the effect that the time during which a person has served as a cadet is to be regarded as "actual time of service in the Army" within the meaning of the Army appropriation act approved February 24, 1881 (21 Stat. L. 346), which provided that "the actual time of service in the Army or Navy, or both, shall be allowed all officers in computing their pay." * * *

In addition to counting service as a cadet of the Military Academy in computing length of service for longevity increase of pay, such service is counted under the law authorizing the retirement of officers on their own applications after 30 years of service. The graduate of the Military Academy is eligible for retirement under that law after 26 years' service as a commissioned officer, whereas the officer appointed from civil life must serve 30 full years before his application for retirement under that law can be favorably considered. Similarly, cadet service is counted in determining the eligibility of officers for retirement under the law that requires that they shall be retired on their own applications after 40 years of service. These are additional

> discriminations against the civilian appointee who pays for his own preliminary education and in favor of the graduate of the Military Academy who is educated for his commission at the expense of the Government.

So the Act of 1912 prohibited counting West Point service in calculating longevity pay. Its purpose was to remove a gross discrimination theretofore existing. *Appellee now contends that Congress reestablished that discrimination by implication.*

Legislative history of the Act of 1920

Section 11 of the Act of 1920, upon the proviso in which the appellee relies, appears on its face primarily to be concerned with the compensation of commissioned officers of the Coast and Geodetic Survey. They are to receive the same compensation as officers of the Navy, with whom by the Act of July 22, 1917 (40 Stat. 88, sec. 16), they hold relative rank. That " same " compensation is to include longevity pay. Such is the substance of the section proper before the proviso.

When section 11 came originally from the House Committee which had the Bill in charge it did not contain the present proviso, but did contain a proviso to the effect that service in the Coast and Geodetic Survey should count in computing longevity or service pay of all officers of the Army or Navy. (See H. R. 11927, Calendar No. 375, 66th Cong., 2d sess., sec. 5.)

Obviously, in the proviso as thus framed, there was injustice and discrimination. It permitted the officer who had served in the Army or Navy to add to the service therein which he could count for longevity (and that did not include his service at West Point), his service in the Coast and Geodetic Survey, and upon the total thus attained to base his longevity pay. In other words, he might *combine* the services in these two different branches. This was right and proper; but other combinations of services for longevity pay were not, generally speaking, possible. The provision for longevity in each branch was separate and allowed no inclusion of service in any other branch in the calculation of longevity. Thus, before the proviso, those officers in the Coast and Geodetic Survey who had had service with the Army and Navy during the war were not entitled to credit for service in the military branches. So, also, were Public Health officers denied credit for service in the Army or Navy, and while Coast Guard officers were entitled to credit for service in the Army, Navy, and Marine Corps (sec. 2, Act of January 28, 1915, 38 Stat. 800, 802), Army, Navy, or Marine Corps officers were not entitled to credit for service in the Coast Guard or the Revenue Cutter Service (25 Com. Dec. 104); and Army, Navy, or Marine Corps officers were not entitled to credit, for longevity pay, for services rendered in the Public Health Service or Coast and Geodetic Survey.

If now, as by the proviso first presented, the Army or Navy officer in calculating his longevity was to be permitted to include service in the Coast and Geodetic Survey, then it was but just that other combinations should likewise be so treated. To accomplish that, the proviso as adopted was substituted by a conference committee for the proviso as first presented. So that, under it, any service in any branch which might be counted for longevity might thereafter be added to any service in any other branch which might be counted for longevity. The change effected by the proviso and the only change intended was, as we think this legislative history shows, that by it for the first time *combination* of all services in calculating longevity became possible. There is no reason whatever for believing that Congress intended to change *the basis within any service* upon which longevity was to be calculated, and, thereby, to reestablish the discrimination against other than West Point officers in the Army which Congress had vigorously condemned and effectually removed by the Act of 1912.

The report of the managers on the part of the House after the conference which framed section 11 in its present form says merely of section 11 and its proviso (H. R. 948, 66th Cong., 2d session):

> Section 11 is substantially the same as section 5 of the Senate amendment. It provides that commissioned officers of the Coast and Geodetic Survey, a highly technical and specialized service, shall receive the same

> pay and allowances as are prescribed for officers of the Navy with whom they hold relative rank, as prescribed in the Act of May 22, 1917. *It also contains a proviso placing all services on an equality in the matter of computation of longevity or service pay.* (Italics ours.)

The sole purpose of the proviso as thus explained by the managers for the House was to "*place all the services on an equality in the matter of computation of longevity or service pay.*" How equality was achieved we have pointed out. But in what way would equality have been promoted by giving to a part of the officers in certain services an unfair advantage not enjoyed by all the officers in any service nor by any of the officers in some of the services? Again, in what way would equality have been promoted by reestablishing a special privilege once enjoyed by graduates of the Academies and which Congress by two Acts had expressly taken away because based on inequality?

To some extent in its opinion the court below relies upon this same report (Record, p. 9), but how incorrectly! The opinion, at least as set out in the record at page 9, inadvertently, of course, *misquotes* the report and then bases its argument on the misquotation. The report is quoted as saying, "it" (that is, section 11) "contains a proviso placing all the *service* on an equality * * *" The court then says, in substance: "Very well, within the service in the Army there is inequality,

since those whose appointments as cadets were before 1912 may count their cadet service for longevity, but those can not whose appointments were subsequent to 1912. It is that inequality that is referred to." But what the managers in their report said was that " it contains a proviso placing all the *services* on an equality." It was not then any inequality *within a service* that was aimed at, but an *inequality between services.*

In connection with this report we add that it is amazing that the managers, although making specific reference in their report not only to section 11, but to the proviso, omitted to call attention to the fact that it repealed two Acts of Congress and overturned the established policy of the United States with regard to the exclusion of service in the Academies from calculation of longevity. *That is, it is amazing, if there were actually any such intent.*

There is nothing in any report of any committee, in the official record of any committee hearing, or in the record of any debate in Congress, to indicate that anyone contemplated that in enacting this proviso in the form in which it is found in the Act there would be worked an implied repeal of section 6 of the Act of 1912. This too is amazing in view of the obvious fact that any such intention would naturally have met with violent opposition from a large number of officers against whom it would have discriminated.

The legislative history of the Act of 1920 fully corroborates the government's present contention

as to its true meaning. It is utterly irreconcilable with the appellee's contention that Congress intended to repeal the Act of 1912.

Repeals by implication not favored

It is, of course, well recognized that repeals by implication are not favored. The rule is stated thus in Black on Interpretation of Law, second edition, par. 107:

> Repeals by implication are not favored. A statute may not be construed as repealing prior acts on the same subject (in the absence of express words to that effect), unless there is an irreconcilable repugnance between them, or unless the new law is evidently intended to supersede all prior acts on the matter in hand and to comprise in itself the sole and complete system of legislation on that subject.

This court said in *United States* v. *Greathouse*, 166 U. S. 601, 605, speaking through Mr. Justice Harlan:

> But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible, to both of them. *Frost* v. *Wenie* (157 U. S. 46, 58); *U. S.* v. *Healey* (160 U. S. 136, 147).

In *Frost* v. *Wenie*, 157 U. S. 47, 58, cited by the court in the *Greathouse* case, the court's language was:

> It is well settled that repeals by implication are not to be favored. And where two

> statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the *whole subject*, and, therefore, to displace the prior statute.

To the same effect is *United States* v. *Yuginovich et al.*, 256 U. S. 450, 463.

Here there is no difficulty in giving effect to both the Acts of 1920 and 1912. Obviously the great purpose (we think the sole purpose) of the proviso in section 11 of the Act of 1920 was to permit services in different branches to be combined in the calculation of longevity. But there is no inconsistency between that purpose and the purpose of section 6 of the Act of 1912. It is only by straining out of the proviso in section 11 of the Act of 1920 an implied and, certainly it must be conceded, an incidental purpose, aside and apart from its chief purpose, that anything is found in the Act of 1920 inconsistent with the Act of 1912. But if repeals by implication are not favored, it is not likely that the court will hold that an Act of Congress has been impliedly repealed by what can be urged only as a possibly secondary and incidental intent labori-

ously extracted from language, the primary intent of which is perfectly clear and perfectly consistent with the intent of the Act said to be repealed.

The language of the Act of 1920

Even if we did not have the light of the legislative history of the Act of 1920 and the benefit of the rule against repeals by implication, and if the words of section 11, including the proviso, stood alone, we submit that these words, standing alone, do not show an intent to change the basis *within any service* upon which longevity is to be calculated therein.

We set out again the words of the proviso. They are:

> *Provided*, That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services.

The subject of the sentence is "longevity pay." Longevity pay to whom? To officers in the Army alone? No. To all officers, whether graduates or not of the Academies, in all of six separte services, including several services not normally preceded by Academy training. The basis of longevity pay by virtue of the proviso is "*hereafter*" to be changed from what it was *heretofore*, for the benefit of *all officers of all these services who have served in more than one branch*. But the only change

of *basis* having such a general application would
a change allowing " *hereafter* " the *totaling* of se
ices in two or more branches. So *that* was t
change of *basis* which the proviso effected, no
change *within* a single branch benefiting only t
officers of that branch and only some of them.

" *Hereafter* " longevity pay is to be based "
the *total* of *all* service in *any* or *all* of said service
The word " any " does not here mean " any on
It means " some " or " any two or more." T
latter is one of the meanings of " any " recogniz
by the lexicographers. (See Standard Dicti
ary.) That such is the meaning in which the w
" any " is used here follows from the fact that
is the " *total* " of " all " service in " any " * *
services that is to be the basis of longevity p
" Total " implies two or more added together.

The new thing effected was this " *totaling* "
terms of service in two or more " services."

Longevity pay was already allowed for the f
period of service *within* any single service.
least that was true as to each of the six servi
except the Army and Navy, as to which two servi
Congress had excluded Academy service from c
culation, and it was true as to actual Army a
Navy service as distinguished from this period
preparation therefor. Since within any giv
service longevity was already allowed for
service, the words " *total of all service* " could
have been used as referring to the sum of t
periods in the same service.

The court below construes the Act of 1920 as if it read: "hereafter longevity pay for officers in the Army shall be based on the total of all service in the Army"; in other words, as if there were no context to affect the meaning or evidence the intent of Congress. Whereas it is the context, which refers to all the services, that alone gives rational significance to the proviso. That will appear conclusively if we substitute for the proviso as it stands six separate sentences, each dealing with a single service in the same manner in which the court below construes the proviso as dealing with Army service. The meaning of a paragraph so composed would be entirely different from that of the proviso as it stands. The intent of the proviso as it stands, that "hereafter" two or more services may be *totaled,* would be wholly unexpressed by such a reconstructed paragraph. So that we say again: It is only when the obvious intent of the *whole* proviso is ignored and a minor intent is painfully squeezed out of a *single phrase* in the proviso that anything is found which may be said to be repugnant to anything in the Act of 1912.

Certainly it would have been easy to have used words expressly repealing the Act of 1912, in so far as it related to longevity, if Congress had any such intent. The fact that they were not used is strong proof of the absence of that intent.

Academy service not Army service

There is still another argument against the conclusion reached below and urged by appellee here.

Even if the words " total of all service," as used in the Act of 1920, refers, among other things, to the " total of all service " *in* the Army, still, service at the Academy is not service in the Army.

When we make that assertion we are met at once with the decisions of this court in the *Morton* and *Watson* cases, supra. But this court did not decide that service at the Academy was *ipso facto* service in the Army. This court decided merely that under then existing legislation it was service in the Army, but the court clearly recognized that it was for the Congress to say what should be service in the Army.

If, after the *Morton* and *Watson* decisions, the Congress had by law decreed that service at the Academy was not service in the Army, certainly no one would now contend that by reason of those decisions an Act referring to " service in the Army " necessarily included service at the Academy. Yet that is precisely what the Congress did decree.

The history of the Act of 1912, hereinbefore set out, as well as the language of that Act, indicates the clear intent of the Congress that thereafter service at the Academy is not to be construed as Army service. Such is the meaning of the words used: (such service) " shall not be counted in computing for any purpose the length of service of any officer of the Army." This court had said: " The language used by the Congress hitherto in its

various Acts indicates that the Congress intended Academy service to be treated as Army service." To that the Congress in the Act of 1912 made reply: "If our language in the past justifies that construction, let us clear the matter up now once for all by saying that hereafter Academy service is not to be counted for any purpose in computing length of Army service."

Suppose there had been no *Morton* or *Watson* decision and the question was now for the first time presented to this court as to whether Academy service should be included in a claim for longevity pay under an act providing that an officer should have such pay based on his service in the Army. Would not this court refer to the Act of 1912 as conclusively determining the matter? If so, then why not now, since the *Morton* and *Watson* cases have no authority other than as declaring the intent of the Congress prior to 1912, at which time the Congress itself expressly declared its intent touching the question.

It might be conceded that for some purposes Academy service is still Army Service. But that concession does not weaken this argument that it is not Army service within the meaning of Acts dealing with longevity. In the light of one Act it may be Army service, in the light of another not. (*Hartigan* v. *United States,* 196 U. S. 169, 171.)

The Act of 1922

Finally light is thrown on what was intended by the Act of 1920 by what was done by Congress in 1922. Reference is to the Act of June 10, 1922 (42 Stat. 625, 627). One paragraph thereof (page 627) reads as follows:

> For officers appointed on and after July 1, 1922, no service shall be counted for purposes of pay except active commissioned service under a Federal appointment and commissioned service in the National Guard when called out by order of the President. For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay, and service as a contract surgeon serving full time; and also 75 per centum of all other periods of time during which they have held commissions as officers of the Organized Militia between January 21, 1903, and July 1, 1916, or of the National Guard, the Naval Militia, or the National Naval Volunteers since June 3, 1916, and service as a contract surgeon serving full time, shall be included in the computation.

If the Congress by the Act of 1920 intended that Academy Service should be counted for longevity pay, then the Congress by the Act of 1922 abandoned that idea as to all Army officers thereafter coming into the service. The Act of 1922 says that "For officers appointed on and after July 1, 1922, *no* service shall be counted for purposes of pay ex-

cept active commissioned service." (Service at the Academies is not active commissioned service. *Hartigan* v. *United States,* 196 U. S. 169.) One would think that if in 1922 the Congress intended to abandon a policy it had impliedly reestablished in 1920, at least some discussion would have been provoked. But no, in the legislative history of the Act of 1922 there is not a word to indicate that anyone in the Congress knew that the Congress had in 1920 changed the law as to service in the Academies being excluded from calculation of longevity and was now once more reversing its position. On the contrary, in the legislative history of the Act of 1922 what reference there was to the Act of 1912 (and that occurred in the debates) indicated the belief that it was still in force. (Address of Mr. Oliver, vol. 62, pt. 7, Congressional Record, p. 6758, second column.) In one of the hearings on the Act it had been stated by an officer of the Army in answer to a question by a member of the House of Representatives, Mr. Oliver, that the Act of 1912 cut out cadet service from the calculation of longevity. (Hearings before House committee on H. R. 10972, pp. 52 and 53.)

Moreover the text of the Act of 1922 is inconsistent with the theory that Congress in 1920 had ordained that Academy service was to be included in calculating longevity. The Act provided that "For officers in the service on June 30, 1922, there shall be included in the computation all service

which is now counted in computing longevity pay." But, despite the Act of 1920, Academy service was not then being counted. If the Congress in 1920 intended to reestablish Academy service on the pre-1912 basis, the Government was flouting that intent. Certainly, if ever there was such intent, *now was the time to make it clear beyond all possibility of doubt*. That was not done. The Congress merely said in substance, longevity shall continue to be calculated as now as to all officers in service on June 20, 1922.

CONCLUSION

We respectfully submit that for the reasons we have hereinbefore set out the judgment of the court below should be reversed.

JAMES M. BECK,
Solicitor General.
MERRILL E. OTIS,
Special Assistant to the Attorney General.
MARCH, 1925.

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